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**IN THE
COURT OF APPEALS OF INDIANA**

TOMMIE BROWNLEE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0701-CR-18

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Elizabeth Christ, Judge
Cause No. 49G09-0604-CM-064261

October 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Tommie C. Brownlee (“Brownlee”) appeals his convictions for Carrying a Handgun Without a License and Dangerous Possession of a Firearm, both Class A misdemeanors, claiming that the evidence is insufficient to support the convictions. Specifically, he contends that he was not in constructive possession of the handgun that was used to support both convictions. Although we find that the evidence is sufficient to show that Brownlee constructively possessed the handgun, we conclude that his simultaneous convictions subjected him to double jeopardy; thus, we vacate the Dangerous Possession of a Firearm conviction.

Facts and Procedural History

On April 8, 2006, two Indianapolis Police Department Officers, Gregory Weber (“Officer Weber”) and Chad Eric Osborne (“Officer Osborne”), responded to a report of a suspicious vehicle loitering in a cul-de-sac area for several hours. As the officers approached the vehicle, they saw a sixteen year old, later identified as Brownlee, in the driver’s seat and another individual in the passenger’s seat. Officer Weber noticed a strong odor that he believed to be burnt marijuana coming from the vehicle. The passenger, whose girlfriend was the owner of the car, became argumentative so the officers removed both individuals from the vehicle and handcuffed them for officer safety. Subsequently, Officer Weber entered the vehicle to perform a search because of the marijuana odor. He noted that the keys were in the ignition, but the engine was not running. When Officer Weber bent down, he saw a .38 caliber handgun underneath the bench seat but closer to the driver’s side. Officer Weber estimated that the handgun was

within arm's reach as it was within a foot and a half of the steering wheel. Furthermore, he indicated that the handgun was not hidden and that he believed Brownlee would have been able to see it from the driver's seat.

The State charged Brownlee with Count I, Carrying a Handgun without a License as a Class A misdemeanor,¹ and Count II, Dangerous Possession of a Firearm as a Class A misdemeanor.² After a bench trial, the trial court found him guilty of both counts and sentenced him to time served. Brownlee now appeals.³

Discussion and Decision

On appeal, Brownlee contends that the evidence is insufficient to support his convictions for Carrying a Handgun without a License and Dangerous Possession of a Firearm. In order to convict Brownlee of Carrying a Handgun without a License as charged in this case, the State was required to prove that he “carr[ied] a handgun in any vehicle or on or about [his] body, except in [his] dwelling, on [his] property or fixed place of business, without a license issued under this chapter being in [his] possession.” Ind. Code §§ 35-47-2-1, 35-47-2-23(c). Additionally, in order to convict Brownlee of Dangerous Possession of a Firearm as charged in this case, the State was required to prove that Brownlee was a child and that he knowingly, intentionally, or recklessly

¹ Ind. Code §§ 35-47-2-1, 35-47-2-23(c).

² Ind. Code § 35-47-10-5.

³ The State brings to our attention that Brownlee's appellate counsel acted as a *pro tem* judge in his case by scheduling his pre-trial conference. The State points out that the judicial action taken was “innocuous” and did not result in error. We agree with the State and do not believe that there was any impropriety on the part of counsel or that confidential information was gathered as a result of counsel's involvement.

possessed a firearm. *See* Ind. Code § 35-47-10-5. Specifically, Brownlee argues that there was no evidence that he was in constructive possession of the handgun.

Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

Possession of contraband may be either actual or constructive. *Holmes v. State*, 785 N.E.2d 658, 660 (Ind. Ct. App. 2003). Actual possession occurs when a person has direct physical control over the item. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Brownlee did not have actual possession of the handgun. In order to establish constructive possession, the State must show that defendant had both the intent and the capability to maintain dominion and control over the contraband. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Id.* This knowledge may be inferred from the defendant's exclusive dominion and control over the premises containing the contraband, or, if the control is non-exclusive, evidence of "additional circumstances" pointing to the defendant's knowledge of the presence of the contraband and his ability to control it. *Id.* Where a firearm is involved, these additional circumstances include: (1) incriminating statements

from the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the firearm; (5) location of the firearm within the defendant's plain view; and (6) close proximity of the firearm to other items owned by the defendant. *Ables v. State*, 848 N.E.2d 293, 297 (Ind. Ct. App. 2006).

Here, Brownlee did not have exclusive control over the premises containing the handgun because there was also a passenger in the car. The "additional circumstances," however, are sufficient to support the finding that Brownlee knew of the presence of the gun. That is, Officer Weber testified that the handgun was in Brownlee's plain view and that Brownlee was in close proximity to the gun, only a foot and a half away. It was reasonable for the trier of fact to infer that Brownlee had knowledge of the presence of the handgun, which establishes his intent to maintain dominion and control over the gun. *See Iddings*, 772 N.E.2d at 1015.

In addition to the intent to maintain dominion and control over contraband, constructive possession also requires that the defendant have the capability to do so. *Id.* A defendant is capable of maintaining dominion and control over contraband when he is able to reduce the contraband to his personal possession or to otherwise direct its disposition or use. *Ables*, 848 N.E.2d at 297. Brownlee's capability of maintaining dominion and control over the handgun was established by Officer Weber's testimony that the gun was within his arm's reach. Thus, the evidence is sufficient to prove that Brownlee had the capability to maintain control over the handgun.

In sum, we conclude that there is sufficient evidence to support Brownlee's convictions for Carrying a Handgun without a License and Dangerous Possession of a Firearm.

Nonetheless, we determine, *sua sponte*, that Brownlee's simultaneous convictions for Carrying a Handgun without a License and Dangerous Possession of a Firearm subjected him to double jeopardy. We raise the issue *sua sponte* because a double jeopardy violation, if shown, ensnares fundamental rights. *Scott v. State*, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006). Brownlee was convicted of Carrying a Handgun without a License for possessing a handgun and convicted of Dangerous Possession of a Firearm for the same action.

Article I, Section 14 of the Indiana Constitution provides that "no person shall be put in jeopardy twice for the same offense." The Double Jeopardy Clause is violated if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Guyton v. State*, 771 N.E.2d 1141, 1142 (Ind. 2002) (citing *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). In addition to the instances covered by *Richardson*, "we have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson*." *Id.* at 1143. The list of five categories from Justice Sullivan's concurrence in *Richardson* includes, "[c]onviction and punishment for a crime which consists of the very same act as another

crime for which the defendant has been convicted and punished.” *Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring).

In this case, the same act, *i.e.*, Brownlee’s constructive possession of a handgun, was used to establish both convictions. Under Justice Sullivan’s double jeopardy category stated in *Richardson*, Brownlee was convicted and punished for Carrying a Handgun without a License for possessing a handgun, the very same act that was also used to convict him of Dangerous Possession of a Firearm. We therefore vacate Brownlee’s conviction for Dangerous Possession of a Firearm and remand to the trial court for correction of its records consistent with this opinion.

Affirmed in part, vacated in part.

BAKER, C.J., and BAILEY, J., concur.